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Supreme Court, U.S.
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Docket No. 85-1038

In The

Supreme Court of the United States

April Term, 1986

YONG BING-NAM, a/k/a YONG PIAN-NAM, a/k/a BING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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13 pp

QUESTIONS PRESENTED

1. Whether the Court should have enforced the cooperation plea agreement between Petitioner and the Government when a deal was made between the Petitioner and the Government and the Petitioner based his subsequent cooperation on that agreement?

2. Whether the prosecutor's rebuttal summation was so grossly improper as to require a reversal?

3. Whether error was committed in sustaining the prosecutor's objections to questions directed to an FBI agent concerning prior inconsistent statements of a key government witness?

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In The

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April Term, 1986

YONG BING-NAM, a/k/a YONG PIAN-NAM, a/k/a BING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari of the New York Court of Appeals for the Second Circuit

The petitioner, Yong Bing-Nam, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 17, 1986.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported but is reprinted in our Appendix.

JURISDICTION

Following a Jury trial, the petitioner was found guilty in the United States District Court for the Northern District of New York of Kidnapping, Conspiracy to Kidnap, Conspiracy to Transmit Ransom Demands in Interstate Commerce, Conspiracy to Receive Ransom Money, and Receipt of Such Monies (18 U.S.C. Sec. 1201(a)(1), 1201(c), 371, 1202).

On January 25, 1985, the petitioner was sentenced to a sentence of life imprisonment. Joint and several restitution with the petitioner's co-defendants of $150,000.00 was imposed. On January 17, 1986, the Court of Appeals for the Second Circuit affirmed the petitioner's conviction on all counts.

STATUTORY PROVISIONS INVOLVED

§1201. Kidnapping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(32) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(32) [49 USC §1301(32)]); or

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title [18 USCS §1116(b)], shall be punished by imprisonment for any term of years or for life.

(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

(c) If two or more persons conspire to violate this section or one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

(d) Whoever attempts to violate subsection (a)(4) shall be punished by imprisonment for not more than twenty years.

§1202. Ransom Money

Whoever receives, possesses, or disposes of any money or other property, or any portion thereof, which has at any time been delivered as ransom or reward in connection with a violation of section 1201 of this title [18 USCS §1201], knowing the same to be money or property which has been at any time delivered as such ransom or reward, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(June 25, 1948, ch 645, §1, 62 Stat. 760.)

§371. Conspiracy to commit or to defraud United States

If two or more persons conspire to either commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 24, 1948, ch 645, §1, 62 Stat. 701.)

AMENDMENT VI

In all prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF FACTS

The facts relevant to the issues presented by this case, although complex, can be simplified. Accordingly, we have recruited only the most essential facts from the complicated record below.

The petitioner was arrested on the night of October 6, 1983, by a force of at least 22 law enforcement officers. He was arrested at the Kingston Tea Garden and was taken to the Kingston Police Barracks. Bing said nothing other than his name from the time he was arrested until the time he arrived at the State Police Barracks. He was taken to an office and seated in a straight upright chair where he remained and was questioned for the next twelve hours.

During the course of the questioning the petitioner was told that he was going to be charged with a conspiracy to kidnap, for which he could receive a sentence of life imprisonment. The petitioner said that he wanted to serve no time in jail, and was told that was not possible, but the agents would speak to an

Assistant U.S. Attorney to see what was possible. After communicating with the Assistant U.S. Attorney, the agents discussed the cooperation/plea offer with the petitioner with the full knowledge, authorization and consent of the U.S. Attorney's Office. Assistant U.S. Attorney Homer agreed to a reduced charge with a maximum ten year sentence if the petitioner could answer the questions on a list formulated by an FBI Special Agent. Petitioner was told that if he negotiated with the attorney's office and if he would truthfully and to his full knowledge answer these certain questions, he might be charged with an offense with a maximum ten year sentence and might actually serve three and a third years. After the FBI agents had received authorization from the U.S. Attorney's Office to make a deal, defendant agreed to the deal.

The petitioner subsequently provided information to the police in five of the seven categories of questions put to him. The two questions which he was not able to answer were questions to which he had told the police he might not be able to answer even prior to his interview. The interview took place on October 7, 1983 and was reinterviewed by the FBI on October 8, 1983.

The information provided by the petitioner to the FBI was summarized in a five-page, single spaced report.

REASONS FOR GRANTING WRIT

1. *The cooperation/plea agreement made between the petitioner and the government must be enforced.*

Petitioner argued in the Courts below that the government was bound by its representation that petitioner would receive a lighter sentence in exchange for his cooperation. The Court of Appeals for the Second Circuit held that it was unenforceable because petitioner never entered a guilty plea, citing *Mabry v. Johnson*, 104 S. Ct. 2543, 2546-47 (1984).

The issue presented by petitioner was not decided in *Mabry*. This Court held that defendant's acceptance of a prosecutor's proposed plea bargain did not create a constitutional right to have the bargain specifically enforced. However, in the instant case, the petitioner agreed to the deal proposed by the FBI, who were acting with the blessing of the United States Attorney's Office. It was not until *after* the petitioner had cooperated that the offer was withdrawn, and not before, as was the case in

Mabry. Fairness would preclude the prosecution's withdrawal of the plea proposal not only after the defendant accepted it but after he had cooperated to the best of his ability.

The conduct of the FBI shows that it did not deal fairly with the petitioner. The FBI posed a limited set of questions, obtained answers to those questions, and avoided its contractural obligation to petitioner by arguing that Bing should have said even more, even though he wasn't asked. This is improper, since considerations concerning a plea/cooperation agreement "presuppose fairness in securing an agreement between an accused and a prosecutor." (*Santobello v. New York*, 404 U.S. 257, 261 (1971)

The government is bound by the rules involving formal plea negotiations (*United States v. Grant*, 622 F. 2d 308, 313 (8th Circuit, 1980)). A cooperation agreement, like a plea agreement, is contractual in nature and subject to contract law standards and remedies. (See *United States v. Carrillo*, 709 F. 2d 35, 36 (9th Cir., 1983)).

The agreement should be enforced under settled notions of fundamental fairness.

2. *The prosecutor's rebuttal summation was grossly improper and constituted reversable error.*

The prosecutor, during his rebuttal summation, elected to discuss issues which he had not previously raised. The most egregious error was a discussion by the Assistant U.S. Attorney concerning $1,200.00 found on Bing's person at the time of his arrest. This did not direct itself to anything defense counsel said during his summation and did not rebut anything mentioned in summation. Despite a timely objection from counsel, this was grossly prejudicial and inflammatory.

The prosecutor should not be permitted to develop new arguments on rebuttal, but should be restricted to answering the arguments put forth by defense counsel (*Moore v. U.S.*, 344 F. 2d 558 (1965)). While the Trial Court has discretion as to the application of the rule governing the scope of rebuttal (*United States v. Lawson*, 483 F. 2d 535 (8th Cir., 1973)), that discretion is not so broad as to permit a trial judge to oversee a blow to the defendant's right to a fair trial caused by government's "sand-bagging". The government should not be allowed, as it was here, to conceal a salient point or feature of the case and then, if it is not argued by defendant, make a closing argument on that

feature. (*Misch v. CB Construction Company*, 394 SW 2d 98, 102 (1965)).

The issue is an important one involving the ethical obligation of a prosecutor upon which this Court has not specifically spoken.

3. *The Courts below erred in sustaining the prosecutor's objections to questions directed to an FBI agent concerning prior inconsistent statements of a key government witness.*

The District Court failed to allow petitioner to produce previous inconsistent statements made by chief government witness Eng to government agents. The Court below held that petitioner failed to meet the requirements of Fed. R. Evid. 613(b), so that there was no error, and even if there was, it was harmless error.

Petitioner submits that the Court below erred in so holding.

At the very least, a prior inconsistent statement of a witness is admissible for impeachment purposes. Fed. R. 801(d)(1)(A) also accords substantive use to prior inconsistent statements "if the declarant testifies at trial and is subject to cross-examination concerning the statement," provided that the statement is "inconsistent with his testimony and was given under oath and subject to the penalty of perjury at trial . . . "

Petitioner submits that the answers provided by FBI Agent Flynn were directly and irreconcilably inconsistent with the prosecution witness, William Eng, and defense counsel should have been permitted to explore the discrepancy.

The testimony of Eng was central to the government theory. These errors deprived petitioner of his right to effective confrontation in cross-examination of the witnesses against him and his right to present defensive evidence, all in violation of his Sixth Amendment rights.

The testimony should have been allowed.

CONCLUSION

For these various reasons, the Petition for Certiorari should be granted.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of January, one thousand nine hundred and eighty-six.

Present:

HONORABLE RICHARD J. CARDAMONE

HONORABLE GEORGE C. PRATT

Circuit Judge

HONORABLE CHARLES E. WYZANSKI, JR.*

District Judge

UNITED STATES
COURT OF APPEALS
FILED

JAN 17, 1986
ELAINE B. GOLDSMITH,
CLERK
SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee,

ORDER
Docket Nos.
85-1038
85-1039
85-1040
85-1041

-against-

YONG BING-NAM, a/k/a YONG PIAN-NAM, a/k/a BING;
YONG BING-KEONG, a/k/a YONG PIAN-KEONG, a/k/a

TOMMY YOONG: YONG BING-GONG a/k/a
YONG PIAN-GONG a/k/a PETER: QUAH CHOON-PHENG,
a/k/a MING, a/k/a UNG HO CA,

Defendants-Appellants.

Appellants are co-conspirators who appeal their convictions in the United States District Court for the Northern District of New York (Miner, J.) arising from their participation in a kidnapping. After a jury trial, appellant Yong Bing-Keong (Keong) was found guilty of conspiracy to receive ransom money and actual receipt of such monies in violation of 18 U.S.C §§ 371, 1202: appellant Quah Choon-Pheng (Quah) was found guilty of conspiracy to kidnap and receipt of ransom money (18 US.C. § 1201(c), 371): appellant Yong Bing-Nam (Bing) was found guilty of kidnapping, conspiracy to kidnap, conspiracy to transmit ransom demands in interstate commerce, conspiracy to receive ransom money, and receipt of such monies (18 U.S.C. § 1201(a)(1), 1201(c), 371, 1202): and appellant Yong Bing-Gong (Gong) was found guilty of kidnapping, conspiracy to kidnap, conspiracy to transmit ransom demands in interstate commerce, transmission of ransom demands in interstate commerce, conspiracy to receive ransom money, and receipt of said monies (18 U.S.C. § 1201(a)(1), 1201(c), 371, 875(a), 1202).

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*United States District Judge for the District of Massachusetts, sitting by designation.

.A. v. BING-NAM
Docket Nos. 85-1038, 1039, 1040, 1041

The convictions result from the appellants' participation in the kidnapping of Yim Ling Eng. Without making specific reference to the role each of the appellants played in the plot, the appellants planned and executed the forcible abduction of Ms. Eng from her home in Westchester County, New York and transported her to New Jersey. A ransom was demanded from

her husband and delivered to Gong, who represented himself as an intermediary between the husband and the supposed kidnappers, but who was in reality one of the actual abductors. Efforts were made to launder the ransom money and one appellant fled the country. Ms. Eng's whereabouts are still unknown.

Each of the appellants challenge the sufficiency of the evidence supporting their respective convictions. After viewing the record in the light most favorable to the government, we find none of these challenges to have merit. *United States v. Pedroza*, 750 F.2d 187, 198 (2d Cir. 1984). Two of these claims require comment. Appellant Gong argues that the government had failed to show that Ms. Eng had actually been transported across state lines. We find that when the events that occurred in New York — many of the planning meetings and the actual kidnapping — are coupled with the events that took place in New Jersey — the purchase of the rental car, the placing of two ransom calls, and the statement that Ms. Eng's body could be found there — that a jury could reasonably conclude that Ms. Eng had been transported across state lines. Appellant Keong challenges his conviction arguing that there was no showing that he knew that the money that he possessed was ransom money. We note that the jury could infer, based upon Keong's possession of a large amount of the ransom monies, that he knew the source of those funds. *Cf. United States v. Johnpoll*, 239 F.2d 702, 711-12 (2d Cir.), *cert. denied*, 105 S. Ct. 571 (1984). When this evidence is combined with Keong's statement regarding the source of the funds we find that there was a reasonable basis for a jury to conclude that he knew that he possessed ransom money.

Several other claims require comment. Bing seeks enforcement of a cooperation agreement which he entered into with the government. The agreement is unenforceable because Bing never entered a guilty plea. *Mabry v. Johnson*, 104 S. Ct. 2543, 2546-47 (1984). Bing also challenges the failure of the district court to allow him to produce what he alleges were previous inconsistent statements made by Mr. Eng to government agents. Since the appellant failed to meet the requirements of *Fed. R. Evid. 613(b)* there was no error and even if there were, it was harmless error. Appellant Gong challenges the introduction of evidence concerning his efforts to extort additional ransom monies. The trial

court properly permitted the introduction of this evidence. Fed. R. Evid. 404(b); *see United States v. Silker*, 751 F.2d 477, 487-88 (2d Cir. 1984); *United States v. Levy*, 731 F.2d 997, 1002-04 (2d Cir. 1984).

For these reasons, the judgments of convictions are affirmed.

.A. v. BING-NAM
Docket Nos. 85-1038, 1039, 1040, 1041

s/s Richard J. Cardamone, U.S.C.J.

s/s George C. Pratt, U.S.C.J.

s/s Charles E. Wyzanski, Jr., U.S.D.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.